voluntary pleas of guilty. (See attached certified copies of the judgments of conviction.)

It is therefore urged upon this Court that consideration of the factors of purpose, reliance on the old rule and burden on the administration of justice in the State of Tennessee are entitled to such overriding significance as to deny retroactive application of the rule laid down in *Waller*.

Respectfully Submitted

/s/ Edward E. Davis
EDWARD E. DAVIS
District Attorney General
For Respondent

[Certificate of Service (Omitted in Printing)]

JUDGMENT

IN THE CRIMINAL COURT
OF HAMILTON COUNTY, TENNESSEE
DIVISION II

October 4, 1962

Court met pursuant to adjournment, present and presiding the Honorable Tillman Grant, Judge, etc., when the following proceedings were had, to-wit:

* * * *

103812

STATE v. SAMUEL ED ROBINSON—Felonious Assault

Came the Attorney General and the defendant in person, and this case came on for trial on the defendant's plea of guilty to the offense of Assault With Intent to Commit Murder in the First Degree before the Court and the following jury, to-wit: Mrs. J. H. Lee, A. N. Lindsay, W. A. Uren, Robert T. Malone, Jr., John F. Hoodenpyle, Louie E. Henry, B. D. Sutherland, Paul D. Cooper, Saul Hyman, Robert R. Cooper, Milburn Hassler and Raymond L. Robbins, all duly qualified, elected and sworn, who fix the punishment for the defendant at a term of not more than 10 years in the penitentiary.

It is therefore the judgment of the Court that the defendant be confined in the penitentiary for a term of not less than 10 years nor more than 10 years and pay all costs. Execution will issue against the defendant for the costs.

* * * *

103810

STATE v. SAMUEL ED ROBINSON—Felonious Assault

Came the Attorney General and the defendant in person, and this case came on for trial on the defendant's plea of guilty to the offense of Assault With Intent to Commit Murder in the First Degree before the Court and

the following jury, towit: Mrs. J. H. Lee, A. N. Lindsay, W. A. Uren, Robert T. Malone, Jr., John F. Hoodenpyle, Louie E. Henry, B. D. Sutherland, Paul D. Cooper, Saul Hyman, Robert R. Cooper, Milburn Hassler and Raymond L. Robbins, all duly qualified, elected and sworn, who fix the punishment for the defendant at a term of not more than 5 years in the penitentiary.

It is therefore the judgment of the Court that the defendant be confined in the penitentiary for a term of not less than 3 years nor more than 5 years, and pay all costs. Execution will issue against the defendant for the costs.

It is further ordered that the sentence in this case run consecutively to the sentence in Case Number 103812.

* * * *

103811

STATE v. SAMUEL ED ROBINSON—Felonious Assault

Came the Attorney General and the defendant in person, and this case came on for trial on the defendant's plea of guilty to the offense of Assault With Intent to Commit Murder in the First Degree before the Court and the following jury, to-wit: Mrs. J. H. Lee, A. N. Lindsay, W. A. Uren, Robert T. Malone, Jr., John F. Hoodenplye, Louie E. Henry, B. D. Sutherland, Paul D. Cooper, Saul Hyman, Robert R. Cooper, Milburn Hassler and Raymond L. Robbins, all duly qualified, elected and sworn, who fix the punishment for the defendant at a term of not more than 10 years in the penitentiary.

It is therefore the judgment of the Court that the defendant be confined in the penitentiary for a term of not less than 3 years nor more than 10 years and pay all costs. Execution will issue against the defendant for the costs.

It is further ordered that the sentence in this case run consecutively to the sentence in Case Number 103810.

Thereupon Court adjourned until tomorrow morning at 9:15 A. M.

/s/ Tillman Grant
TILLMAN GRANT
Judge

[Clerk's Certificate (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

W. S. NEIL, Warden, Tennessee State Penitentiary

ORDER—Filed June 9, 1970

This is a proceeding upon a petition for a writ of habeas corpus. The respondent has now filed an answer. The sole question raised by the record as it is presently constituted is whether the holding of *Waller* v. *Florida*, 38 L. W. 4263 (April 6, 1970) should be applied retroactively. The Court is of the opinion that this matter may properly be decided upon briefs without the need for an evidentiary hearing. The defendant has filed a brief in support of his position. The petitioner will be allowed 20 days to submit his brief on the legal issue here presented. Upon receipt of the petitioner's brief or upon the expiration of time for the filing thereof, the Court will proceed to a decision of the issue presented.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

MEMORANDUM—September 22, 1970

This is a proceeding upon a petition for a writ of habeas corpus wherein the petitioner seeks to set aside his convictions and sentences in three cases, each entitled *State of Tennessee* v. *Samuel Ed Robinson*, being Docket Nos. 103,810, 103,811, and 103,812 in the Criminal Court for Hamilton County, Tennessee.

It appears undisputed in this case that the petitioner was tried and convicted of three offenses of assault and battery in violation of an ordinance of the City of Chattanooga, and was fined $50.00 and assessed costs upon each offense. Thereafter, on September 26, 1962, a grand jury of Hamilton County returned three indictments in the above three cases, each charging petitioner with an offense of assault with intent to commit first degree murder. The occurrences giving rise to the three indictments were the same as those giving rise to the three city charges. Upon petitioner's plea of guilty to the indictments, he received two sentences of three to ten years and one sentence of three to five years, such sentences to run consecutively. Upon July 12, 1966, petitioner filed a petition for a writ of habeas corpus in the Criminal Court for Davidson County, Tennessee, upon grounds of double jeopardy. The writ was denied. Petitioner appealed to the Tennessee Supreme Court, which affirmed the judgment below. Upon March 28, 1967, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee upon grounds of double jeopardy. This

action was subsequently transferred to this court. By order dated May 15, 1967, this Court denied the writ. See *Samuel Ed Robinson* v. *C. Murray Henderson*, 268 F. Supp. 349 (E. D. Tenn., 1967). Petitioner appealed to the Sixth Circuit Court of Appeals, which affirmed this Court's denial of the writ by order dated April 10, 1968.

The instant petition again raises the double jeopardy argument. As in the prior petition filed in 1967, the petitioner's sole contention in the instant case is that he was twice placed in jeopardy for the same offense and that the convictions and sentences resulting from the second trial are therefore invalid. The petitioner relies upon the recently decided Supreme Court case of *Waller* v. *Florida*, 25 L. Ed.$_2$ 435 (April 6, 1970). The facts, as stated above, being undisputed, the issue before the Court is one of law.

The facts in *Waller* v. *Florida* were as follows. Joseph Waller, together with a number of other persons, removed a canvas mural from the wall inside of the City Hall in St. Petersburg, Florida. As a result of this act, Mr. Waller was found guilty in municipal court of destruction of city property and disorderly breach of the peace and was sentenced to 180 days in the county jail. Subsequently, an information was filed against Mr. Waller charging him with grand larceny. Mr. Waller was found guilty of the charge, was sentenced to six months to five years, less 170 days of the 180-day sentence imposed by the municipal court. It was undisputed that the same facts gave rise to the city and state charges placed against Mr. Waller. In discussing the applicability of the Fifth Amendment's prohibition against double jeopardy as applied to the States in *Benton* v. *Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), the Court specifically held as follows:

> "We decide only that the Florida courts were in error to the extent of holding that—
>
> '. . . even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar

> to the prosecution of such person in the proper state court.' "

The Court concluded that the defendant's second trial based on the same facts giving rise to the municipal court trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution.

The relevant factual situation in the instant case and in *Waller* are substantially identical. The only legal problem presented is whether the holding in *Waller* should be applied retroactively. The petitioner contends that it should. On the other hand, the respondent submits that the holding in *Waller* should be applied prospectively only. In support of his legal position the petitioner relies upon certain footnotes in *Waller* v. *Florida*, *supra*, and in *Ashe* v. *Swenson*, —— U.S. ——, —— L. Ed. 2d —— (1970). The respondent on the other hand relies upon the criteria outlined in *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199, and *Desist* v. *United States*, —— U.S. ——, —— S. Ct. ——, 22 L. Ed. 2d 248 (1969).

Before reviewing these criteria relied upon by the respondent, attention will be focused first upon the recent Supreme Court cases dealing specifically with the double jeopardy issue. The relevant portion of the Fifth Amendment to the United States Constitution provides: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ." In *Benton* v. *Maryland*, —— U.S. ——, —— S. Ct. ——, 23 L. Ed. 2d 707 (1969), the Supreme Court stated:

> ". . . [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko* v. *Connecticut* is overruled."

The defendant in *Benton* was tried in a state court for burglary and larceny. The defendant was convicted upon the burglary count but was found not guilty upon the larceny count. On appeal his conviction for burglary was set aside and the case was remanded for reindictment

and retrial. The defendant was reindicted upon both the larceny and the burglary charge and upon retrial was convicted of both charges. The conviction was affirmed on appeal by the state court, but reversed by the United States Supreme Court. Justice Marshall, speaking for the Court, stated: "It is clear that petitioner's larceny conviction cannot stand once federal double jeopardy standards are applied."

North Carolina v. Pearce, —— U.S. ——, —— S. Ct. ——, 23 L. Ed. 2d 656 (1969), decided the same day as *Benton* v. *Maryland*, *supra*, again dealt with the mandates of the Double Jeopardy Clause. As a prelude to its decision, the Court made the following comments relative to the scope of the Double Jeopardy Clause:

> "The Court has held today, in *Benton* v. *Maryland*, —— U.S. ——, 23 L. Ed. 2d 707, 89 S. Ct. ——, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

With this analysis of the guarantee against double jeopardy, the Court went further and held that:

> "The constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense."

Further, the Court concluded that neither the Double Jeopardy Clause nor the Equal Protection Clause absolutely proscribes a more severe sentence upon reconviction.

Upon April 6, 1970, the Supreme Court decided *Waller* v. *Florida*, *supra*, upon which the petitioner in the instant case relies. The decision of the Court has hereto-

fore been outlined and will not be repeated. However, in arriving at the decision in *Waller* the majority and concurring opinions offer certain language that is relevant to the question presented by the instant case. Initially, Justice Burger notes the holding in *Benton* v. *Maryland* and states further:

> "Here, as in *North Carolina* v. *Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969), *Benton* should be applied to test petitioner's conviction, although we need not and do not decide whether each of the several aspects of the constitutional guarantee against double jeopardy requires such application in similar procedural circumstances."

As a footnote to the aforementioned comment, Justice Burger provides the following admonition:

> "*Benton* v. *Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) controls any case which arises in its ambit. See *Ashe* v. *Swenson*, —— U.S. —— at —— n. 1, 25 L. Ed. 2d at 469, 90 S. Ct. ——. Nonetheless, when this Court granted certiorari in *Price* v. *Georgia*, No. 269, 1969 term, it requested that counsel "brief and argue [the] question of retroactivity of *Benton* v. *Maryland* [395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056], and whether that decision is applicable to this case." 395 U.S. 975, 23 L. Ed. 2d 764, 89 S. Ct. 2138 (1969). *By our decisions in the instant case and in Ashe* v. *Swenson, supra, we do not resolve with respect to the circumstances presented in Price* v. *Georgia, supra, either of the two questions posed by the Court in that case.*" (Emphasis added)

Justice Brennan, however, in his concurring opinion expresses his views on *Benton* in the following terms:

> "I adhere to the Court's holding in *Ashe* v. *Swenson*, —— U.S. at —— n. 1, 25 L. Ed. 2d at 469, 90 S. Ct. ——, that our decision in *Benton* v. *Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969), holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States, is 'fully " 'retro-

active' ".' See also *North Carolina* v. *Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969)."

In *Ashe* v. *Swenson*, —— U.S. ——, —— S. Ct. ——, 25 L. Ed 2d 469 (1970) decided the same day as *Waller* v. *Florida*, *supra*, the Supreme Court held that in view of *Benton* v. *Maryland*, *supra*, the federal rule of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. Mr. Justice Stewart wrote the majority opinion and expressed the opinion of seven members of the Court. In footnote 1 Justice Stewart made the following observation:

> "There can be no doubt of the 'retroactivity' of the Court's decision in *Benton* v. *Maryland*. In *North Carolina* v. *Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072, decided the same day as *Benton*, the Court unanimously accorded fully 'retroactive' effect to the *Benton* doctrine."

The final case decided last term by the Supreme Court in the double jeopardy area was *Price* v. *Georgia*, —— U.S. ——, —— S. Ct. ——, 26 L. Ed. 2d 300 (1970). In the *Price* case, the defendant was tried upon a charge of murder and the jury returned a verdict of guilty as to the lesser included offense of voluntary manslaughter. The conviction was reversed on appeal and the defendant was retried over his objection upon the original charge of murder. The Supreme Court in setting aside the second conviction held that while the accused could have been retried upon the lesser included offense of voluntary manslaughter, the double jeopardy prohibition of the Fifth Amendment prohibited his being twice put in jeopardy on the murder charge even though on the second trial he was convicted only of the same lesser offense as in the first trial.

Once again in footnote 9 Chief Justice Burger makes the following observation:

> "The last of the decisions of the Georgia court affirming the petitioner's conviction was rendered on September 24, 1968, well before *Benton* was decided. But *Benton* has fully retroactive application. See *Waller* v. *Florida*, 397 U.S. 387, 391 n. 2 (1970), . . ."

Although there has never been a reasoned analysis by the Supmere Court on the issue of retroactivity, this Court can only conclude from the above review of the cases that *Benton* v. *Maryland* and *Waller* v. *Florida* should each be accorded fully retroactive application. See also in this connection *Mullreed* v. *Kropp*, (C.A. 6 1970) 425 F. 2d 1095.

Were this Court to make its determination of retroactivity on the basis of the criteria laid down by the United States Supreme Court in the cases of *Linkletter* v. *Walker*, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965); *Stovall* v. *Denno*, 388 U.S. 293, 18 L. Ed 2d 1199, 87 S. Ct. 1967 (1967); and *Desist* v. *United States*, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969), a different result might well be required. Considering the extent of reliance by law enforcement authorities upon the rule as it existed prior to *Waller* v. *Florida*, considering the effect on the administration of justice occasioned by the new rule laid down in that case, and noting particularly the large number of jurisdictions that have treated municipalities and the state as separate sovereigns for double jeopardy purposes (see footnote 3 in *Waller* v. *Florida*), this Court is of the opinion that a careful and reasoned inquiry should be made as to whether the administration of justice might not be seriously disrupted by retroactive application of the rule in *Waller* v. *Florida*. It appears however, for the reasons stated above, that that inquiry is now precluded, at least to a lower federal court.

A judgment will accordingly enter setting aside the petitioner's convictions and sentences in Criminal Docket Nos. 103,810, 103,811, and 103,812 in the Criminal Court for Hamilton County, Tennessee. The petitioner will be forthwith released from any further custody by reason of the said convictions and sentences.

The entry of a judgment in accordance with this memorandum will be stayed for a period of seven days to permit the parties to make representations unto the Court regarding the form of the order to be entered, including any provisions regarding the release of the petitioner, regarding an appeal, regarding any further stay pending appeal, and regarding bail pending appeal.

Reference in this regard is made to Rule 23(c), *Federal Rules of Appellate Procedure.* An oral hearing will be held upon these matters at 4:00 p.m. on September 29, 1970, at which the petitioner need not be present in person but will be represented by counsel.

FRANK W. WILSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

ORDER—September 29, 1970

A conference was held upon this 29th day of September, 1970, pursuant to the memorandum of the Court heretofore entered on September 22, 1970, as regards the form and conditions of the judgment to enter on the said memorandum. Present at the conference were James D. Robinson, counsel for the petitioner, and General Edward E. Davis, District Attorney General, counsel for the respondent. Upon representation of counsel for the respondent that he proposed to immediately file a petition to reconsider and upon request that the entry of a judgment be further stayed herein, the Court, after receiving argument of counsel, concluded that a further stay of ten days should be granted to receive and consider any motion to reconsider. A further hearing will be set herein upon October 7, 1970, at 4:00 p.m. at which the Court will receive oral argument in support of the motion to reconsider.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

ORDER—Filed October 27, 1970

This action is presently before the Court upon the respondent's motion to reconsider. The respondent seeks by this motion to have this Court reconsider its memorandum of September 22, 1970, wherein the Court held that the case of *Waller* v. *Florida*, —— U.S. ——, —— S. Ct. ——, 25 L. Ed. 2d 435 (April 6, 1970) should be accorded fully retroactive application.

Having considered the brief of the respondent and argument of counsel and having re-examined the relevant cases upon this matter, the Court is of the opinion that its memorandum of September 22, 1970, was in error to the extent of holding that:

> "Although there has never been a reasoned analysis by the Supreme Court on the issue of retroactivity, this Court can only conclude from the above review of the cases that *Benton* v. *Maryland* and *Waller* v. *Florida* should each be accorded fully retroactive application."

Upon re-examination of *North Carolina* v. *Pearce*, 23 L. Ed. 2d 656 (1969); *Benton* v. *Maryland*, 23 L. Ed. 2d 707 (1969); *Waller* v. *Florida*, 25 L. Ed. 2d 435 (1970); *Ashe* v. *Swenson*, 25 L. Ed 2d 469 (1970); and *Price* v. *Georgia*, 26 L. Ed. 2d 300 (1970), it is quite clear that the holding in *Benton* v. *Maryland*, namely that the double jeopardy prohibition of the Fifth Amendment applies to the states through the Fourteenth Amendment, is to be accorded fully retroactive application.

However, close re-examination of these cases also discloses that the pronouncement of the Supreme Court regarding retroactivity in each instance refers only to the holding in the case of *Benton* v. *Maryland*, *supra*, and that the Supreme Court has neither directly nor by implication accorded *Waller* v. *Florida*, *supra*, retroactive application insofar as the *Waller* case holds that the "dual sovereignty" theory is an anachronism and should be abrogated with regard to city and state prosecutions. Accordingly, this Court is of the opinion that the retroactivity of *Waller* v. *Florida* has not been resolved by the Supreme Court and must therefore be determined on the basis of the criteria established by the Supreme Court in the cases of *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Stovall* v. *Denno*, 388 U.S. 293 (1967); and *Desist* v. *United States*, 394 U.S. 244 (1969).

In this regard, the Court is further of the opinion that an evidentiary hearing should be held upon November 3, 1970, at 3:00' p.m. in order to afford both parties an opportunity to present evidence and argument upon (1) the purpose to be served by the abrogation of the dual sovereignty theory with regard to city and state prosecutions; (2) the extent of the reliance by law enforcement authorities upon the dual sovereignty theory; and (3) the effect on the administration of justice of a retroactive application of the *Waller* case insofar as it abrogates the dual sovereignty theory as it was applied to city and state prosecutions.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

ORDER—November 18, 1970

This case came on for further hearing upon this 17th day of November 1970, whereupon counsel for the respondent moved the Court to be allowed additional time to accumulate and present evidence with respect to the impact of a retroactive application of the rule laid down in *Waller* v. *Florida*, —— U.S. ——, 25 L. Ed. 2d 435. Having heard argument of counsel thereon and considered the objections of counsel for the plaintiff, the Court is of the opinion that the further hearing in this case should be continued until 4:30 p.m. upon November 30, 1970.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

EXHIBIT 1

AFFIDAVIT

CLYDE M. SANDERS, having been first duly sworn deposes and says:

That he is the duly elected, qualified and acting Clerk of the Criminal Courts for Hamilton County, Tennessee.

That he has been associated with this office for more than twenty-five years and has held his present position for ten years.

That a part of his work as such Clerk is the handling of all cases sent to the State Criminal Courts from the municipal courts of the City of Chattanooga, Tennessee.

I would estimate that until recently fully ninety-five (95%) percent of the State cases coming to the State Courts have had accompanying charges of violations of City of Chattanooga municipal ordinances arising out of the same acts upon which the State charges were founded.

That for the most part the municipal ordinances involved in these cases were either duplication of State statutes, or lesser offenses included in the State laws.

Further this deponant saith not.

This 30th day of November, 1970.

/s/ Clyde M. Sanders
CLYDE M. SANDERS

Sworn to before me this
November 30th, 1970.

/s/ Virginia J. Johnson
VIRGINIA J. JOHNSON
NOTARY PUBLIC
My Commission Expires:
October 8, 1972

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

W. S. NEIL, Warden, Tennessee State Penitentiary

AFFIDAVIT OF PHIL M. CANALE, JR.

I, Phil M. Canale, Jr., do hereby certify that I am the District Attorney General for the 15th Judicial Circuit of the State of Tennessee (Shelby County) and have been so since March 15, 1955.

Upon an examination by my office of the possible effects of holding United States Supreme Court case of *Waller* vs. *Florida*, 38 L. W. 4263, April 6, 1970, retroactive, I make the following observations to this Honorable Court. The Criminal Court Clerk's Office of Shelby County, Tennessee reports that an average of 5,000 True Bills are returned by the Grand Jury of Shelby County in each calendar year. The present misdemeanors pending in Shelby County, Tennessee as of this date is 2,015. Based upon a survey made by sampling our our cases, which we feel to be an accurate representation of all our cases, we have found that there would be a minimal effect on felonies which were pending both prior to *Waller* vs. *Florida*, and presently pending if *Waller* vs. *Florida* were declared to be retroactive. This minimal effect is due to the established way in which the bind-over hearings were held in the City Court in this jurisdiction; other counties could be adversely affected to a much greater degree. However, with respect to misdemeanors that are presently pending, we feel that approximately 15% of the present misdemeanors in Shelby County would have to be dismissed if *Waller* vs. *Florida* was declared

to be retroactive and if there was no distinction made between the very limited jurisdiction of the municipal courts of Tennessee as compared to the municipal courts of Florida.

/s/ Phil M. Canale, Jr.
PHIL M. CANALE, JR.

COUNTY OF SHELBY
STATE OF TENNESSEE

Came on before me this 30 day of October, 1970, Phil M. Canale, Jr., whom I personally know to be Phil M. Canale, Jr. and stated to me that the above information is true according to his best knowledge, information and belief.

/s/ Brian Jaff
BRIAN JAFF
Notary Public

My Commission Expires:
Jan. 10, 1972

PHIL M. CANALE, JR.
District Attorney General
Fifteenth Judicial Circuit of Tennessee
County of Shelby

Lloyd A. Rhodes
Executive Assistant

William D. Haynes
Administrative Assistant

John L. Carlisle
E. L. Hutchinson, Jr.
Clyde R. Venson
Criminal Investigators

Non Support Division
Earl E. Fitzpatrick
Assistant Attorney General
H. J. Beach
Investigator
Phone 534-9250

Assistants
Ewell C. Richardson
Jewett H. Miller
J. Clyde Mason
Sam J. Catanzaro
Leonard T. Lafferty
Arthur T. Bennett
Don D. Strother
Don A. Dino
Joseph L. Patterson
Eugene C. Gaerig
Harvey Herrin
John W. Pierotti
James G. Hall
James H. Allen
Thomas F. Graves
Thomas A. Stroud
T. E. Crawford
Billy F. Gray
Raymond S. Clift
Don F. Young
Leland M. McNabb

Shelby County Office Building
157 Poplar Avenue
Memphis, Tenn. 38103

Phone 901-534-9251

November 17, 1970

Honorable Edward Davis
District Attorney General
Courthouse
Chattanooga, Tennessee

Dear General Davis:

In response to your request to check the list of the 840 names which you sent me, who are presently inmates in the State Penitentiary from Shelby County to deter-

mine what percentage would be affected by a retroactive ruling of the *Waller* decision, this is to advise that time did not permit the checking of the entire list. We selected at random 42 files from your list which is 5% of the total, and feel that this figure is representative of the total and reflects an accurate picture of the situation in Shelby County.

Of the 42 files we checked, we found two (2) cases which could be adversely affected by a retroactive ruling, which indicates to me that we have approximately 40 serious felony cases involving people in the penitentiary which would probably be subject to release if *Waller* is held retroactive.

As I mentioned to you on the phone, we have been fortunate in this jurisdiction in the manner in which these cases have been handled in City Court as far as the lack of placing city charges on these serious felony cases. I feel you will probably find in other jurisdictions in this state and other states, the percentage of cases adversely affected by such a ruling would be much greater.

Sincerely yours,

/s/ Phil M. Canale, Jr.
PHIL M. CANALE, JR.
District Attorney General

PMCjr/bk

EXHIBIT 3

AFFIDAVIT

I, Edward E. Davis, being first duly sworn do depose and say:

That I am the duly qualified, elected and acting District Attorney General for the Sixth Judicial Circuit for the State of Tennessee.

That at my request a survey of the Attorneys General of the several states was made by the Honorable David M. Pack, Attorney General for the State of Tennessee of the possible impact on the administration of justice in each of the jurisdictions if the holding of the United States Supreme Court in the case of *Waller* v. *Florida*, 90 S. Ct. 1184 were to be given retroactive application.

That as of the date hereof responses from such survey number twenty-seven. These responses are attached hereto and filed herewith as exhibits #1-27 to this affidavit.

That there are approximately 267 inmates presently in the Tennessee penitentiaries who were convicted in Hamilton County, Tennessee.

That it is estimated that one-half of this number, or 133, were charged in situations arising in the geographical limits of the City of Chattanooga, Tennessee and consequently were taken first through the municipal court of the City of Chattanooga.

Based upon the affidavit of the Criminal Court Clerk of Hamilton County, Tennessee that ninety-five (95%) of the defendants coming from that municipal court have in the past been charged with both State and City offenses, either the same or as lesser included offenses, that there are now some 126 persons presently in the penitentiary who could possibly be subject to release if *Waller* v. *Florida* be given retroactive application.

That time has not permitted any examination of either the defendants sentenced to the Hamilton County workhouse or jail on less serious felonies or misdemeanor cases where the same dual prosecution situation has existed.

Further this deponant saith not.

/s/ Edward E. Davis
EDWARD E. DAVIS
District Attorney General

Sworn to and subscribed before me
this 30th day of November, 1970.

/s/ Virginia J. Johnson
VIRGINIA J. JOHNSON

NOTARY PUBLIC

October 8, 1972

MY COMMISSION EXPIRES

EXHIBIT 1

STATE OF ALABAMA
Office of Attorney General
Montgomery, Alabama 36104

November 12, 1970

[STATE SEAL]

MacDonald Gallion
Attorney General
R. Hunter Phillips
Executive Assistant

John G. Bookout
Deputy Attorney General

Assistant Attorneys General
Charles H. Barnes
Richard F. Calhoun
David W. Clark
Paul T. Gish, Jr.
Leslie Hall
Lloyd G. Hart
Herbert H. Henry, III
Randolph G. Lurie
William N. McQueen
Gordon Madison
Joseph G. L. Marston, III
Robert E. Morrow
Tabor R. Novak, Jr.
William G. O'Rear
Jamie L. Pettigrew
Joseph V. Price, Jr.
Jasper B. Roberts
Bernard F. Sykes
Walter S. Turner
John C. Tyson, III

The Honorable David M. Pack
Attorney General of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

In regard to your inquiry concerning the impact of retroactive application of the *Waller* case in Alabama, I have contacted our prison officials to determine the number of prisoners who might be held under similar facts. I have been told by them that it would be practically impossible to make this determination and that even if it could be made that there would be less than a dozen people who would fall within the *Waller* facts.

Their thoughts on the number of possible individuals involved are probably correct since even though technically possible double prosecutions of the type in *Waller* are strongly discouraged.

I am sorry that I have not been able to give you any positive information to use in your upcoming case.

Sincerely,

MACDONALD GALLION
Attorney General

By:

/s/ Joseph Victor Price, Jr.
JOSEPH VICTOR PRICE, JR.
Assistant Attorney General

JVP:as

EXHIBIT 2

[STATE SEAL]

Telephone
793-3500

WILLIAM J. SCOTT
Attorney General
State of Illinois
160 North La Salle St.
Chicago 60601

November 19, 1970

The Honorable David M. Pack
Attorney General of the State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

I have your letter of October 29, 1970, requesting my analysis of the effect of a decision making *Waller* v. *Florida*, 397 U.S. 387 (1970) retroactive. In my opinion, such a holding would have little practical effect in Illinois.

As the Supreme Court recognized in *Waller*, Illinois is one of the states which treats a single act as a possible violation of both a state penal statute and a municipal ordinance. Prior to *Waller*, each of these violations could be separately tried and punished without violating the concept of double jeopardy. See *City of Evanston* v. *Wazau*, 364 Ill. 198, 4 N.E. 2d 78 (1936); *City of Chicago* v. *Clark*, 359 Ill. 374, 194 N.E. 537 (1935); *City of Chicago* v. *Berg*, 48 Ill. App. 2d 251, 199 N.E. 2d 49 (1964); *People* v. *Behymer*, 48 Ill. App. 2d 218, 198 N.E. 2d 729 (1964).

The Illinois compulsory joinder statute [Ill. Rev. Stat., (1969), Ch 38 § 3-3. Multiple Prosecutions for Same Act] requires that several offenses established by the same conduct of a defendant, if known to the proper prosecuting officer at the time of commencing prosecution and within the jurisdiction of a single court, must

be prosecuted in a single prosecution. However, the term "offense" is defined as a violation of a state penal statute. Therefore, the compulsory joinder provision applies only to prosecution for violations under state law and has no application to the situation treated in *Waller*. Yet, the statute does indicate the prevailing philosophy in Illinois that several criminal charges arising from the same conduct should be tried in a single prosecution.

In practice, a defendant usually would be prosecuted on the state charge if the act involved constitutes a more serious offense or is an element of a more serious offense than the municipal violation. Rarely would this prosecution be followed by a trial of the ordinance violation. Therefore, while the decision in *Waller* has effected a change in the Illinois law of multiple prosecutions, it has not altered the practice generally followed prior to that decision. Therefore, holding *Waller* retroactive would have minimal effect other than to formalize the prior Illinois practice.

Very truly yours,

WILLIAM J. SCOTT
Attorney General
State of Illinois

By /s/ James B. Zagel
JAMES B. ZAGEL
Assistant Attorney General

JBZ:pad

EXHIBIT 3

[STATE SEAL]

THE STATE OF COLARADO

Department of Law

Office of the Attorney General

Duke W. Dunbar
Attorney General

104 State Capitol
Denver, Colorado 80203

John P. Moore
Deputy
Attorney General

November 4, 1970

Honorable David M. Pack
Attorney General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

This office does not maintain sufficient records to advise you to what effect the holding of *Waller* v. *Florida* would have upon the administration of justice in the State of Colorado.

Prosecutions are handled by local district attorneys who do not come under our jurisdiction. Therefore, we are not privy to any information pertinent to the prior criminal records of persons convicted by the district attorney.

Very truly yours,

/s/ John P. Moore
JOHN P. MOORE
Deputy Attorney General

JPM:HT

EXHIBIT 4

[STATE SEAL]

THE DEPARTMENT OF LAW
State of Georgia
Atlanta
30334

Arthur K. Bolton
Attorney General

132 State Judicial Building
Telephone: 525-0401

November 4, 1970

Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

This is in reply to your letter inquiring about the impact in Georgia if *Waller* v. *Florida*, 397 U.S. 387 (1970) should be applied retroactively.

Georgia adheres to a preemption doctrine which denies local governments the authority to prohibit by ordinance that conduct which has been declared criminal by the State Penal Code. Therefore, the *Waller* decision precluding both municipal and State trials for an identical offense should have a minimal impact upon the administration of the criminal laws of this State.

Very truly yours,

/s/ Arthur K. Bolton
ARTHUR K. BOLTON
Attorney General

AKB:jg

EXHIBIT 5

[STATE SEAL]

Address Reply to
"The Attorney General of Hawaii"
and Refer to
Initials and Number
WHY:bys

Cable Address:
AttGen

Bertram T. Kanbara
Attorney General

STATE OF HAWAII
Department of the Attorney General

Hawaii State Capitol
4th Floor
Honolulu, Hawaii 96813

November 6, 1970

David M. Pack, Esq.
Attorney General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Re: Waller v. Florida, 397 U.S. 387

Dear General Pack:

This is in response to your letter of October 29, 1970 inquiring as to the impact that giving the rule enunciated in Waller v. Florida retroactive effect would have on the administration of justice in our State.

The answer appears to be "none".

In our State, the county legal offices handle all prosecutions of both state statutes and county ordinances. The Office of the Prosecuting Attorney of the City and County of Honolulu (the County which has the bulk of our population) could not recall any instance of separate prosecutions of the same person for a violation of an ordinance and for a violation of a statute growing out of the same acts.

Yours truly,

/s/ William H. Yim
WILLIAM H. YIM
Deputy Attorney General
State of Hawaii

EXHIBIT 6

[STATE SEAL]

STATE OF IDAHO
Office of the Attorney General

Robert M. Robson
Attorney General

Boise 83707

November 3, 1970

The Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

I have received your letter of October 29, 1970, by which you have asked me to anticipate the effect of a possible retroactive application of *Waller* v. *Florida*.

In the first instance, I would suggest that to retroactively apply the *Waller* case would be to unduly burden the administration of our criminal process. This is especially so in a state housing a great number of felonious offenders who are first convicted of violating a local city ordinance.

Unfortunately, the State of Idaho has not now, nor during the past decade, confined an offender under the circumstances posed by the *Waller* case. While, therefore, a retroactive application of *Waller* v. *Florida* will not directly affect the Idaho criminal process, I am fully aware and sympathetic toward those states which will be inundated with writs of habeas corpus. In my opinion, to crowd the already overcrowded court dockets by applying *Waller* retroactively, we will simply witness an undesirable form of jurisprudential suicide.

I wish to thank you and if I may be of further service in any way, please feel free to contact me.

Very truly yours,

/s/ Robert M. Robson
ROBERT M. ROBSON
Attorney General

RMR:sam

EXHIBIT 7

[STATE SEAL]

Theodore L. Sendak
Attorney General

STATE OF INDIANA
Attorney General
Indianapolis
46204

November 4, 1970

The Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

In response to your request concerning the applicability of *Waller* v. *Florida*, I am unable to give you a definite answer. Apparently, the precise issue that was raised in *Waller* has never been decided in this State.

I spoke with the head of adult corrections in the Indiana Department of Corrections, and he stated that he was unaware of any inmate who might be affected by the *Waller* decision.

It is our feeling that if any Indiana inmate had been committed under circumstances to which *Waller* would be applicable, a Writ of Habeas Corups would have been filed by this time. We have no such writs in our office.

If I may be of service in any other way, please advise.

Sincerely,

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM F. THOMPSON
Assistant Attorney General

/s/ Fred R. Spencer
FRED R. SPENCER
Law Clerk

FRS/jf

EXHIBIT 8

[STATE SEAL]

James S. Erwin
Attorney General

George G. West
John W. Benoit, Jr.
Jon R. Doyle
Deputy Attorneys General

STATE OF MAINE
Department of the Attorney General
Augusta, Maine 04330

November 5, 1970

The Honorable David M. Pack
Attorney General of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

This will acknowledge receipt of your letter of October 29 concerning the retroactive effect of *Waller* v. *Florida*. This office does not do all the criminal prosecution in the State. The bulk of the criminal prosecution is handled by the County Attorney in each of our 16 counties. However, I have never heard of any problem that has been created by the *Waller* case. I doubt very much if any prosecutor in the State has ever tried to prosecute a case in the manner which was done in Florida.

Very truly ypurs,

/s/ George C. West
GEORGE C. WEST
Deputy Attorney General

GCW:H

EXHIBIT 9

[STATE SEAL]

Leon S. Cohan
Deputy Attorney General

STATE OF MICHIGAN
Department of Attorney General

FRANK J. KELLEY
Attorney General
Lansing
48913

November 10, 1970

The Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37218

Dear General Pack:

In response to your letter of October 29, 1970, regarding the impact of *Waller* v. *Florida*, 397 U.S. 387, if the decision is held to be retroactive, I regret that I cannot be helpful.

The information you seek would have to be found by an examination of the files of more than 8,000 inmates of our prison system and I know you will realize the impracticability of doing this.

With best personal regard.

Yours very truly,

/s/ Frank J. Kelley
FRANK J. KELLEY
Attorney General

EXHIBIT 11

[STATE SEAL]

A. F. Summer
Attorney General

Department of Justice
Office of the Attorney General
Jackson, Mississippi 39205

November 3, 1970

Honorable David M. Pack, Attorney General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

In your letter of October 29, 1970, you state that you are compiling a memorandum to the United States District Court for the Eastern District of Tennessee in support of your position that to apply *Waller* v. *Florida*, 397 U.S. 387 (1970) would have a disruptive effect throughout the United States upon the administration of criminal justice.

I am sure you noted in footnote 3 to the Court's opinion in *Waller*, the case of *May* vs. *Town of Carthage*, 191 Miss. 97 So. 2d 801 (1941) was cited. The holding of the Mississippi Supreme Court in that case was, as pointed out in Chief Justice Burger's opinion in *Waller*, to the effect that municipalities and the state are separate sovereign entities each capable of imposing punishment for the same alleged crime. *Waller* now holds that this is not so and that municipalities, being creatures of the state, are regarded as governmental instrumentalities created by the state and are not to be considered as separate sovereign entities such as the States and the United States.

I have discussed the possible effect of the retroactivity of *Waller* with members of my staff, who have been in the criminal [illegible]
Waller retroactive would probably have no effect whatsoever in Mississippi. It would be impossible to canvass every municipality and county to determine if anyone is presently serving a sentence where he was convicted both for an offense against a municipality and against the state, but it is safe to say that there are probably none. It has been very seldom that anyone in Mississippi has been prosecuted both for an offense against a municipality and also against the state arising out of the same factual situation.

You may be interested to know that, while *Waller* involves a violation of a city ordinance and a state statute, in Mississippi it is not necessary for the municipalities to adopt ordinances, since under Section 3374-78 Mississippi Code 1842 Recompiled all penal offenses under the laws of the state which are misdemeanors are made offenses against municipalities when committed within the corporate limits.

I am sorry that I cannot give you any comfort from this end of the line. When your memorandum has been completed I would appreciate a copy of it.

Sincerely,

/s/ A. F. Summer
A. F. SUMMER
Attorney General

AFS/dm

EXHIBIT 12

[STATE SEAL]

John C. Danforth
Attorney General

Offices of the
ATTORNEY GENERAL OF MISSOURI
Jefferson City

November 5, 1970

Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

This will acknowledge receipt of your letter dated October 29, 1970, which has been referred to me for reply.

We have no available figures which would illustrate the disruptive effect of a retroactive application of *Waller* v. *Florida*. Frankly, I would imagine that those persons who are incarcerated for serious offenses, who prior to their state convictions were tried in a municipal court, could be counted on both hands. This is just a personal estimate and, frankly, we have no figures to back it up.

One effect of *Waller* v. *Florida* has been to generate some thinking, especially in the urban areas, about a common warrant office where all warrants for arrest on prosecutions pending in municipal or state courts would originate. Therefore, an easy check would be available on prosecutions violative of the *Waller* decision.

I am sure you are aware of the recent case of *State* v. *Fletcher*, 8 CrL 1013 (10-23-70), which appears to be a further extension of the *Waller* doctrine.

General Danforth sends his kindest regards and asked me to reply on his behalf as he is recuperating from the recent Senatorial race.

Respectfully,

/s/ Dale L. Rollings
DALE L. ROLLINGS
Chief Counsel
Criminal Division

dl

EXHIBIT 13

State of Nebraska

DEPARTMENT OF JUSTICE

Clarence A. H. Meyer
Attorney General

Lincoln
68509

November 3, 1970

Hon. David M. Pack
Attorney General of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

In reply to your October 29 letter requesting information on the possible effect of a retroactive application of Waller v. Florida, I am afraid that Nebraska cannot be of much help to you. I cannot recall a situation of this kind in the 20 years I have been here in the office. Further confirmation that we have not had a case of this kind arises from the fact that not a single penitentiary prisoner has initiated a habeas corpus action based on Waller, and they seem to get Supreme Court opinions, and to use them, before we get the opinions.

Very truly yours,

/s/ Clarence
CLARENCE A. H. MEYER
Attorney General

CAHM:dnj

EXHIBIT 14

[STATE SEAL]

STATE OF NEVADA
Department of Attorney General
Carson City

November 4, 1970

The Honorable David M. Pack
Attorney General of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

re: Waller v. Florida, retroactive application

Dear General Pack:

In answer to your inquiry of October 29, 1970, concerning possible retroactive application of *Waller* v. *Florida* and its effect within Nevada, let me say that Nevada's position anticipated *Waller* in 1935 in *State* v. *Holm*. To the best of our knowledge, there would be no effect insofar as our State Supreme Court is concerned.

Sincerely,

HARVEY DICKERSON
Attorney General

/s/ George H. Hawes
GEORGE H. HAWES
Deputy Attorney General

GHH/cw

EXHIBIT 15

[STATE SEAL]

THE STATE OF NEW HAMPSHIRE
Attorney General
Concord

Warren B. Rudman
Attorney General

William F. Cann
Deputy Attorney General

Assistant Attoneys General
Robert W. Moran
Irma A. Matthews
Henry F. Spaloss
Donald A. Ingram
David H. Souter
W. Michael Dunn
Thomas B. Wingate

Attorneys
John T. Pappas
Richard A. Hampe
Judith D. Mulligan
Donald W. Stever, Jr.

November 12, 1970

Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

Attorney General Warren Rudman has instructed me to answer your letter of October 29, 1970, with respect to the question of the retroactive application of *Waller* v. *Florida.*

We anticipate no difficulties whatever arising out of the *Waller* decision and it is of no consequence in our State whether the *Waller* decision should be held to be retroactive.

Sincerely yours,

/s/ Henry F. Spaloss
HENRY F. SPALOSS
Assistant Attorney General

HFS:bas

EXHIBIT 16

[STATE SEAL]

STATE OF NEW MEXICO
Office of the Attorney General
Department of Justice

James A. Maloney
Attorney General

Gary O'Dowd
Deputy Attorney General
Assistant Attorneys General
Leila A. Andrews
Frank N. Chavez
James C. Compton, Jr.
C. Emery Cuddy, Jr.
John A. Darden, III
Carl P. Dunifon
Thomas L. Dunigan
Ray H. Shollenbarger
Richard J. Smith
Mark B. Thompson, III

Thomas P. Whelan, Jr.

P. O. Box 2246
Santa Fe, N.M. 67501

November 4, 1970

The Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

You have asked whether the recent Supreme Court case of *Waller* v. *Florida*, would have a significant impact upon the administration of justice in the State of New Mexico if this decision were made retroactive.

Although we are not able to tell you the number of persons who are now incarcerated in our state penitentiary for serious offenses, who prior to their state trial were tried in a municipal court for violation of a local ordi-

nance, we assume that there are very many. This assumption is based upon the fact that many of our municipalities have adopted as their criminal codes the State Criminal Code and therefore have identical criminal offenses as the State. We realize that a number of persons in the penitentiary have been tried both in municipal court and in our state court and that the retroactive application of the *Waller* decision would require that many of these individuals be released from the penitentiary without any possibility of them being retried.

We feel that anything that you may do to prevent the retroactive application of this decision will be very beneficial to the State of New Mexico.

Sincerely yours,

/s/ Ray Shollenbarger
RAY SHOLLENBARGER
Assistant Attorney General

RS/gr

EXHIBIT 17

[STATE SEAL]

STATE OF NORTH CAROLINA
Department of Justice

Robert Morgan
Attorney General

P. O. Box 629
Raleigh
27602

3 November 1970

Honorable David M. Pack
Attorney General of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

This is to acknowledge receipt of your letter of October 29, 1970, addressed to Attorney General Robert Morgan, inquiring as to the effect of *Waller* v. *Florida*, 397 U.S. 387 (1970), upon the administration of justice in the State of North Carolina.

In North Carolina all criminal offenses are violation of State law, and, therefore, a plea of former jeopardy has always been sustained if the State subsequently attempted to indict the individual for a felony if the misdemeanor for which he was tried in the inferior court was a lesser included offense. Our local ordinances in this State deal with strictly local matters unrelated to our criminal codes, i.e., zoning violations, business permits, etc., and we are unaware of any instances where a statutory scheme such as that found in the State of Florida and discussed by the Court in Waller can be found in the State of North Carolina.

Therefore, we do not know of any individuals incarcerated in the State of North Carolina who may be

affected by either a prospective or retroactive application of Waller inasmuch as we do not believe our substantive law contains the defect condemned in Waller.

Very truly yours,

ROBERT MORGAN
Attorney General

/s/ Jacob L. Safron
JACOB L. SAFRON
Assistant Attorney General

JLS/p

EXHIBIT 18

[STATE SEAL]

STATE OF NORTH DAKOTA

Helgi Johanneson
Attorney General

Bismark, North Dakota 58501

Paul M. Sand
First Assistant

John E. Adams
Gerald W. Vandewalle
Vance K. Hill
Lynn E. Erickson
Robert P. Brady
Assistants

Telephone
224-2210

Maybelle Gulling
Charlotte Logan
Elsie J. Johnston
Secretaries

Susan Albers
Clerk

John R. Erickson
Auditor

November 5, 1970

The Honorable David M. Pack
Attorney General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear Mr. Pack:

This is in response to your inquiry as to what effect the retroactive application of Waller vs. Florida, 397 U.S. 387, 25 L Ed 2d 435 (1970) has on the State of North Dakota.

As of this date, we are not aware of any proceedings relying upon the above case for a reversal or dismissal of a conviction.

At the time the opinion came out from the United States Supreme Court, I mentioned to H. L. Holt, the director of the League of Municipalities, the possible

results of this case and that the cities should exercise a greater discretion in determiing what type of cases should be prosecuted under the municipal ordinances, particularly if there was a possibility that the violation may have been against the state law, for which a much greater penalty can be imposed.

As of now I have not received any feedback of any kind indicating any problems with the Waller vs. Florida case.

Yours truly,

/s/ Paul M. Sand
PAUL M. SAND
First Assistant
Attorney General

PMS:al

EXHIBIT 19

[STATE SEAL]

G. T. Blankenship
Attorney General

THE ATTORNEY GENERAL
OF OKLAHOMA

Oklahoma City, Okla. 73105

November 4, 1970

Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

In response to your letter of October 29, 1970, the members of this staff devoting their attention to criminal matters, have carefully considered your request for our observations on any effect in this State of retroactive application of *Waller* v. *Florida*, 397 U.S. 387 [1970].

At the present we have no matters pending on appeal which involve the problem presented by *Waller*, supra, and are unable to recall any possible cases that may confront us in the near future.

In consequence we thus are forced to say that we have no basis at this time in this State of forming and expressing an opinion on the possible disruptive affect of retroactive application of *Waller*, supra. However, retroactive application of innovative U.S. Supreme Court decisions on U. S. Constitutional questions in the criminal field is one that has confronted this office upon frequent occasions in the recent past. In each instance, retroactive application of an innovative U. S. Supreme Court decision has been resisted by this office as having a serious affect upon the administration of our criminal laws. We have consistently opposed any retroactive application when that problem has been presented.

We regret our inability to give you more specific information for your use in the U. S. District Court for the Eastern District of Tennessee. This stems from the fact that we have not as yet been confronted with this specific problem here in this State.

Sincerely,

FOR THE ATTORNEY GENERAL

/s/ H. L. McConnell
H. L. MCCONNELL
Assistant Attorney General

HLM:rh

EXHIBIT 20

[STATE SEAL]

Lee Johnson
Attorney General

Diarmuid F. O'Scannlain
Deputy Attorney General

DEPARTMENT OF JUSTICE
State Office Building
Salem, Oregon 97310
Telephone: (503) 364-2171

November 9, 1970

Honorable David M. Pack,
Attorney General of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Re: Retroactivity of *Waller* v. *Florida*

Dear General Pack:

I have no solid data to provide to you, however I am able to give an impressionistic and fragmentary idea of the effect of *Waller* v. *Florida* in Oregon.

The impact of the case is diminished by the existence of ORS 169.160, which provides for discharge of indigents imprisoned for nonpayment of fine after 30 days upon the filing of an oath. It is most frequently the practice of our lower court judges to give either sentences or fines but seldom both. Therefore, I doubt very much that *Waller* v. *Florida* will seriously affect the administration of justice in the state of Oregon.

I would be interested in knowing the outcome of your litigation.

Very truly yours,

/s/ Lee Johnson
LEE JOHNSON
Attorney General

LJ/JBT/js

EXHIBIT 21

[STATE SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin, Texas 78711

Crawford C. Martin
Attorney General

November 12, 1970

Honorable David M. Pack
Attorney General of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear Mr. Pack:

Thank you for your recent letter which General Martin referred, for research and reply, to me.

We regret very much to find that we can be of little assistance to you in responding to your inquiry concerning the case of *Waller* v. *Florida*, 397 U.S. 387 (1970). After careful reflection on how to obtain the information you desire, we are satisfied that the only accurate way to obtain it would be to check the prison records of each inmate presently incarcerated in the Texas Department of Corrections. We have approximately 13,600 inmates there, and have no way, other than by hand, to check each inmate's criminal history to determine whether he had been convicted of a municipal ordinance prior to his felony conviction, arising from the same set of facts.

If time permits, and if such information is crucial to your presentation in the Federal District Court, we will be pleased to consider undertaking such a study as is described above.

Yours very truly,

/s/ Jo Betsy Szebehely

(Mrs.) Jo Betsy Lewallen Szebehely
Assistant Attorney General

JBLS/skt

EXHIBIT 22

THE ATTORNEY GENERAL

[STATE SEAL]

STATE OF UTAH

State Capitol • Salt Lake City
DA 8-5261

Vernon B. Romney
Attorney General

Robert B. Hansen
Deputy Attorney General

November 17, 1970

Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Re: *Waller* v. *Florida*, 397 U.S. 387 (1970)

Dear General Pack:

Attorney General Vernon B. Romney referred to me your letter of October 29, 1970, wherein you inquired as to the effect of a retroactive application of the case of *Waller* v. *Florida*. I have endeavored to ascertain what, if any, effect this would have within the State of Utah.

I have discussed this with several judges, with the gentlemen in our local legal defender office, and with the record's people at the state prison. Thus far, I have not been able to find any cases where the retroactive application of *Waller* would release any individuals from our state prison.

Some time ago, there was a directive sent out to the county attorneys to, in all cases where it is possible, go for the biggest offense possible against an individual and forget the smaller offenses, unless they were lesser included offenses. For this reason, it has been the practice in this State to charge them with the felonies and

disregard any misdemeanors that could have been prosecuted in the justice's or city courts. This has led to what I now find the situation to be, that the retroactive application of *Waller* would have very little, if any, impact within the State of Utah.

Very truly yours,

/s/ Lauren N. Beasley
LAUREN N. BEASLEY
Chief Assistant Attorney General

LNB/sh

EXHIBIT 23

James M. Jeffords
Attorney General
Fred I. Parker, Deputy

Louis P. Peck, Assistant
Governmental Affairs
Ronald H. Bean, Assistant
Litigation
John D. Hansen, Assistant
Local Affairs

[STATE SEAL]

STATE OF VERMONT
Office of the Attorney General
Montpelier
05602
Tel. 802—223-2311, Ext. 432

November 18, 1970

Honorable David M. Pack
Attorney General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

Please pardon my delay in responding to your inquiry of October 29th relative to the local effect of *Waller* v. *Florida*, 397 U.S. 387 (1970).

To the best of my knowledge, all criminal quasi-criminal (motor vehicle, etc.) matters are prosecuted pursuant to State statute in Vermont. Hence, the problem of dual sovereignty, as between State and municipal governments, is and has been non-existent in this jurisdiction. It might be noted, additionally, that municipal courts have been abolished in Vermont and replaced by ten State district courts. Justices of the Peace still have a limited judicial function, but it is seldom exercised and will, in all likelihood, be abolished in the near future.

It was good to hear from you.

Most sincerely,

/s/ James M. Jeffords
JAMES M. JEFFORDS
Attorney General

JMJ/bg

EXHIBIT 24

COMMONWEALTH OF VIRGINIA

[STATE SEAL]

Andrew P. Miller
Attorney General

M. Harris Parker
Chief Deputy Attorney General

Reno S. Harp, III
Deputy Attorney General

D. Gardiner Tyler
William P. Bagwell, Jr.
A. R. Woodroof
Wm. Luke Witt
Overton P. Pollard
F. Lee Davis, Jr.
William M. Phillips
Troy G. Arnold, Jr.
Anthony F. Troy
Gerald L. Baliles
Edward J. White
Walter H. Ryland
Walter A. McFarlane
C. Tabor Cronk
Vann H. Lefcoe
Stuart H. Dunn
Robert A. Johnson
Theodore J. Markow
Wm. Thomas Lehner
Robert L. Simpson, Jr.
Assistant Attorneys General

Office of the Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
703—770-2071

November 16, 1970

Honorable David M. Pack
Attorney General of Tennessee
Nashville, Tennessee

Dear General Pack:

This is in response to your letter of October 29, 1970, inquiring as to what effect a retroactive application of *Waller* v. *Florida*, 397 U.S. 387 (1970) would have on

the administration of criminal justice in the State of Virginia.

I must advise that this decision should have little, if any, impact on convictions in Virginia, since the holding of *Waller* v. *Florida* is already embodied in the Code of Virginia, § 19.1-259, which provides as follows:

> "If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a state and a federal statute, a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the state statute."

I might point out that under the first sentence of this section, a mere proceeding or prosecution which does not result in a conviction does not bar another prosecution in a state court. *Wheeler* v. *Commonwealth*, 180 vg. 8887 88 S.E. 2d 605; *Dykeman* v. *Commonwealth*, 201 Va. 807, 113 S.E. 2d 867.

I hope that this information has been of assistance to you.

Sincerely yours,

/s/ Andrew P. Miller
ANDREW P. MILLER
Attorney General

19:47

EXHIBIT 25

[STATE SEAL]

OFFICE OF THE ATTORNEY GENERAL

Slade Gordon Attorney General

Temple of Justice Olympia, Washington 98501

November 9, 1970

Honorable David M. Pack
Attorney General
State of Tennessee
Nashville, Tennessee 37219

Dear General Pack:

This is response to your inquiry with regard to the effect that retroactive application of *Waller* v. *Florida*, 397 U.S. 387, 25 L ed 2d 435 (1970) would have in the state of Washington.

In *Waller* the court found that trial for a felony based on the same act as an earlier municipal court conviction for violation of a municipal ordinance constituted double jeopardy, and set aside the felony conviction. In 1926, the Washington State Supreme Court, in *State* v. *Tucker*, 137 Wash. 162, 242 Pac. 363, held that an acquittal in in the municipal court of a violation of a city ordinance is not a bar to the subsequent prosecution by the state for the same offense in violation of the state law. You will note reference to this case in footnote number 3, page 439, 25 Led 2d (*Waller* v. *Florida*, *supra*,).

It appears that the Tucker case has remained the law in this state over the years on this particular point. Thus, it is quite possible that we may have persons serving felony sentences which could be affected by retroactive application of Waller. It would entail exhaustive research to tell you the number involved, if, indeed, such records are available.

If such a question is raised here in habeas corpus, and the facts are determined to be in line, we would urge prospective application only for the same reasons which the court set forth in *Linkletter, Johnson* v. *New Jersey*, and similar cases.

We hope our comments have been of some help to you.

Very truly yours,

FOR THE ATTORNEY GENERAL

/s/ Paul J. Murphy
PAUL J. MURPHY
Assistant Attorney General

PJM:bw

EXHIBIT 26

[STATE SEAL]

Robert W. Warren
Attorney General

THE STATE OF WISCONSIN
Department of Justice
Madison

November 16, 1970

Honorable David M. Pack
Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

This is in reply to your letter of October 29, 1970, in which you inquire regarding the impact of a holding that *Waller* v. *Florida* is retroactive.

Notwithstanding *Milwaukee* v. *Johnson* (1927), 192 Wis. 585, 213 N.W. 335, it is not customary in Wisconsin to prosecute offenses under both local ordinances and the state criminal law. It would be my opinion, although no statistical data are available, that the impact of *Waller* v. *Florida* in this state is minimal if not non-existent from the point of view of both retroactive and prospective application.

The principal field in which local and state law overlap is that of traffic offenses, and whether the prosecution is brought under the state law or the local ordinance generally depends upon whether the arrest is made by a local or a state officer. Double prosecutions are, so far as I know, virtually unknown.

Very truly yours,

/s/ Robert W. Warren
ROBERT W. WARREN
Attorney General

RWW:ag

EXHIBIT 27

[STATE SEAL]

OFFICE OF THE
ATTORNEY GENERAL
State of Wyoming
210 Capitol Building
Cheyenne, Wyoming 82001

James E. Barrett
Attorney General

November 4, 1970

The Hon. David M. Pack
Attorney General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

Dear General Pack:

This will acknowledge receipt of your letter of October 29, 1970, wherein you request information relative to the effect of *Waller* v. *Florida* on criminal justice in the state of Wyoming.

Due to the fact that all initial criminal prosecutions in Wyoming are handled by the county and prosecuting attorneys of our twenty-three counties, it would be impossible to determine how many inmates presently incarcerated in the Wyoming Penitentiary have been previously tried for the same offense in municipal or justice of the peace court. It is my feeling, however, that retroactive application of *Waller* v. *Florida* would effect only three or four inmates. Prosecutions in Wyoming are generally brought under the state criminal statutes in district court without regard to violations of municipal ordinances where the offense committed violates both. I am in agreement that were conditions in Wyoming like those of many other states, *Waller* v. *Florida* when applied retroactively could have a far reaching effect on criminal justice.

Sincerely,

/s/ Fred C. Reed
FRED C. REED
Assistant Attorney General

FCR/b

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

—*vs.*—

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary

MEMORANDUM—January 7, 1971

This is a proceeding upon a petition for a writ of habeas corpus wherein the petitioner seeks to set aside his convictions and sentences in three cases, each entitled *State of Tennessee* v. *Samuel Ed Robinson*, being Docket Nos. 103,810, 103,811, and 103,812 in the Criminal Court for Hamilton County, Tennessee.

It appears undisputed in this case that the petitioner was tried and convicted of three offenses of assault and battery in violation of an ordinance of the City of Chattanooga, and was fined $50.00 and assessed costs upon each offense. Thereafter, on September 26, 1962, a grand jury of Hamilton County returned three indictments in the above three cases, each charging petitioner with an offense of assault with intent to commit first degree murder. The occurrences giving rise to the three indictments were the same as those giving rise to the three city charges. Upon petitioner's plea of guilty to the indictments and he received two sentences of three to ten years and one sentence of three to five years, such sentences to run consecutively. Upon July 12, 1966, petitioner filed a petition for a writ of habeas corpus in the Criminal Court for Davidson County, Tennessee, upon grounds of double jeopardy. The writ was denied. Petitioner appealed to the Tennessee Supreme Court, which affirmed the judgment below. Upon March 28, 1967, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of

Tennessee upon grounds of double jeopardy. This action was subsequently transferred to this court. By order dated May 15, 1967, this Court denied the writ. See *Samuel Ed Robinson* v. *C. Murray Henderson*, 268 F.Supp. 349 (E.D. Tenn., 1967). Basing its decision upon *Palko* v. *Connecticut*, (1937) 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, and the line of authority following the *Palko* decision, this Court concluded that the double jeopardy provision of the Fifth Amendment was not applicable to the states and that no Federal Constitutional error was alleged in the petition. Petitioner appealed to the Sixth Circuit Court of Appeals, which affirmed this Court's denial of the writ by order dated April 10, 1968.

The instant petition again raises the double jeopardy argument. As in the prior petition filed in 1967, the petitioner's sole contention in the instant case is that he was twice placed in jeopardy for the same offense and that the convictions and sentences resulting from the second trial are therefore invalid. The petitioner relies upon the recently decided Supreme Court case of *Waller* v. *Florida*, —— U.S. ——, 25 L.Ed.2d 435, 90 S.Ct. —— (April 6, 1970). The facts, as stated above, being undisputed, the issue before the Court is one of law.

The facts in *Waller* v. *Florida* were as follows. Joseph Waller, together with a number of other persons, removed a canvas mural from the wall inside of the City Hall in St. Petersburg, Florida. As a result of this act, Mr. Waller was found guilty in municipal court of destruction of city property and disorderly breach of the peace and was sentenced to 180 days in the county jail. Subsequently, an information was filed against Mr. Waller charging him with grand larceny. Mr. Waller was found guilty of the charge, was sentenced six months to five years, less 170 days of the 180-day sentence imposed by the municipal court. It was undisputed that the same facts gave rise to the city and state charges placed against Mr. Waller. In discussing the applicability of the Fifth Amendment's prohibition against double jeopardy as applied to the States in *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the Court specifically held as follows:

"We decide only that the Florida courts were in error to the extent of holding that—

> '. . . even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.'"

The Court concluded that the defendant's second trial based on the same facts giving rise to the municipal court trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution.

The relevant factual situation in the instant case and in *Waller* are substantially identical. The only legal problem presented is whether the holding in *Waller* should be applied retroactively. The petitioner contends that it should and in support of his legal position relies upon certain footnotes in *Waller* v. *Florida*, *supra*, and in *Ashe* v. *Swenson*, —— U.S. ——, —— L.Ed.2d —— (1970). The respondent on the other hand relies upon the criteria outlined in *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, and *Desist* v. *United States*, —— U.S. ——, —— S.Ct. ——, 22 L.Ed.2d 248 (1969), and contends that in accordance with these criteria the decision in *Waller* should be applied prospectively only.

In the original memorandum filed by the Court upon September 22, 1970, this Court concluded after consideration of the relevant cases upon the double jeopardy question that:

> Although there has never been a reasoned analysis by the Supreme Court on the issue of retroactivity, this Court can only conclude from the above review of the cases that *Benton* v. *Maryland* and *Waller* v. *Florida* should each be accorded fully retroactive application.

In view of this conclusion the Court provided that a judgment would enter setting aside the petitioner's convictions and sentences.

The respondent filed a timely motion to reconsider. Upon reconsideration of the original memorandum opinion and cases upon the subject and for the reasons stated in a memorandum filed upon October 27, 1970, this Court concluded:

> ". . . that the retroactivity of *Waller* v. *Florida* has not been resolved by the Supreme Court and must therefore be determined on the basis of the criteria established by the Supreme Court in the cases of *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Stovall* v. *Denno*, 388 U.S. 293 (1967); and *Desist* v. *United States*, 394 U.S. 244 (1969)."

The Court thereupon set an evidentiary hearing to afford both parties an opportunity to submit any relevant evidence in support of their respective positions. Upon November 30, 1970, the respondent submitted certain statistical information for consideration by the Court in determining the impact of a retroactive application of the *Waller* case. The case has been briefed and argued and is now for decision by the Court.

In embarking upon this analysis of retrospective versus prospective effect of an overruling decision certain general principles have been clearly defined by the Supreme Court. The latest detailed pronouncement of these principles is to be found in *Desist* v. *United States*, 394 U.S. 244, 22 L.Ed.2d 248, 89 S.Ct. 1030 (1969), wherein Justice Stewart observed:

> "Ever since *Linkletter* v. *Walker*, 381 U.S. 618, 629, 14 L.Ed.2d 601, 608, 85 S.Ct. 1731, established that 'the Constitution neither prohibits nor requires retrospective effect' for decisions expounding new constitutional rules affecting criminal trials, the Court has viewed the retroactivity or nonretroactivity of such decisions as a function of three considerations. As we most recently summarized them in *Stovall* v. *Denno*, 388 U.S. 293, 297, 18 L.Ed.2d 1199, 1203, 87 S.Ct. 1967, 'the criteria guiding resolution of the question implicate a) the purpose to be served by the new standards, b) the extent of the reliance by

law enforcement authorities on the old standards, and c) the effect on the administration of justice of a retroactive application of the new standards.'"

Accordingly, "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." See *Linkletter* v. *Walker*, *supra*. Applying the criteria outlined in the *Linkletter* case to the instant case, this Court must look to the history and purpose of the *Waller* rule; any reliance placed by the States upon the rule of law as it existed prior to *Waller*; and the effect on the administration of justice of a retrospective application of *Waller*.

In this regard the Court in *Desist* v. *United States*, *supra*, further outlines the relative importance of each criteria in weighing the relative merits of retroactivity.

> "Foremost among these factors is the purpose to be served by the new constitutional rule. . . . It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity."

The first appropriate inquiry to be undertaken is an examination of the history and purpose of the *Waller* rule. In this regard, the specific holding of *Waller* v. *Florida*, *supra*, is as follows:

> "We decide only that the Florida courts were in error to the extent of holding that—
>
> '. . . even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.'"

The decision in the *Waller* case, holding that a municipal court conviction and a state court conviction of the same offense constitutes double jeopardy and is in violation of the Fifth and Fourteenth Amendments, is in turn based upon the prior decision of the Supreme Court in the case

of *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), wherein the Court overruled *Palko* v. *Connecticut*, *supra*, and held that the Fifth Amendment prohibition against double jeopardy was made applicable to the states through the Fourteenth Amendment.

In *Benton* v. *Maryland*, *supra*, the Court stated:

> ". . . [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko* v. *Connecticut* is overruled."

In examining the purpose of the *Waller* case it is well to note the rationale, history and purpose of *Benton* v. *Maryland* as outlined by Justice Marshall:

> "The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. See *Bartkus* v. *Illinois*, 359 U.S. 121, 151-155, 3 L.Ed.2d 684, 705-707, 79 S.Ct. 676 (1959, Black, J., dissenting). As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. '[T]he plea of autrefoits acquit, or a former acquittal,' he wrote, 'is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.' Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green* v. *United States*, 355 U.S. 184, 187-188, 2 L.Ed.2d 199, 204, 78 S.Ct. 221, 61 A.L.R.2d 1119 (1957), '[T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an indi-

vidual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice.' The validity of petitioner's larceny conviction must be judged not by the watered-down standard enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provision."

Waller v. *Florida* is simply an expansion of the newly announced principles in *Benton* v. *Maryland*. In abrogating the "dual sovereignty" theory with regard to municipal and state charges based upon the identical offense, the Court relied upon the holding in *Benton* for the proposition that the Fifth Amendment prohibition against double jeopardy applied to the states. While recognizing that successive prosecutions by state and federal governments had been held to be non-violative of the Double Jeopardy Clause, since dual sovereignties are involved [see *Fox* v. *Ohio*, 5 How. 410, 12 L.Ed. 213 (1847); *Bartkus* v. *Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1969); *Abbate* v. *United States*, 359 U.S. 187, 3 L.Ed.2d 729, 79 S.Ct. 666 (1969)], the Court held these cases inapplicable in a situation where the successive prosecutions were by municipal and state governments, both arms of the same sovereignty. Rather, in *Waller* the Court followed the rule previously established in the case of *Grafton* v. *United States*, 206 U.S. 333, 51 L.Ed. 1084, 27 S.Ct. 749 (1907), wherein it had been held that "a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court (Philippine Islands), since both are arms of the same sovereignty."

Having pointed out the reliance placed in *Waller* upon the prior decisions of *Benton* v. *Maryland*, *supra*, and *Grafton* v. *United States*, *supra*, two observations are appropriate.

One observation is that the retroactivity of the Benton decision has been decided and that case has been held to be "fully retroactive." See footnotes in both *Ashe* v. *Swenson*, —— U.S. ——, —— S.Ct. ——, 25 L.Ed.2d 469 (1970), and *Waller* v. *Florida*, *supra*. Further, three circuits have considered the issue and have held *Benton* to be fully retroactive. See *Mulreed* v. *Kropp*, 425 F.2d 1095 (C.A. 6, 1970); *Booker* v. *Phillips*, 428 F.2d 420 (C.A. 4, 1970); and *Galloway* v. *Beto*, 421 F. 2d 284 (C.A. 5, 1970). In the *Mulreed* case, *supra*, the Sixth Circuit reasoned the issue of retroactivity as follows:

> "We think this case (*Benton*) goes beyond the concededly important consideration of the integrity of the truth determining process; it goes to the very quick of a very long and cherished heritage in the administration of criminal justice, namely the sometimes extended deprivation of liberty as the price for demanding successfully a trial process free of constitutional infirmity. Therefore we conclude that *Benton* applies retroactively and is controlling here."

Although the retroactivity of the *Benton* decision is not necessarily determinative of the issue presented in the present case, that is, whether *Waller* v. *Florida* should be accorded retroactive effect, it is obvious that the reasoning which accords retroactivity to *Benton* must be given weighty consideration in determining the retroactivity of *Waller* v. *Florida*.

A second observation appropriate at this point is that *Waller* v. *Florida* overrules no previous federal judicial precedent. Rather, it relies upon a reassertion of the principles laid down in the 1907 decision of *Grafton* v. *United States*, 206 U.S. 333, 51 L.Ed. 1084, 27 S.Ct. 749. Accordingly, the *Waller* decision establishes no new federal constitutional interpretation except to the extent that it may overrule some local or state court decision to the contrary.

When the foregoing two observations are jointly considered, they appear to be tantamount to a prior adjudication upon the issue now before the Court and to re-

quire that *Waller* v. *Florida* be given fully retroactive effect. To the extent that the *Waller* decision asserts the double jeopardy rule of *Benton* v. *Maryland*, the issue of retroactivity has been adjudicated. To the extent that the *Waller* decision asserts the rule of *Grafton* v. *United States* to deny any dual sovereignty between a state and its municipalities, no new federal constitutional law is established and no former federal precedent is overruled.

A consideration of the two remaining criteria for determining the issue of retroactivity, that is, the reliance placed by law enforcement officials upon a contrary rule and the effect on the administration of justice of a retroactive application, would appear to be precluded under the foregoing discussion of Supreme Court decisions, for their analysis is appropriate only where retroactivity remains in question after a consideration of the initial criteria. See *Desist* v. *United States, supra.*

It may be noted in this regard that Chief Justice Burger in a footnote to his opinion in the *Waller* case (see footnote #3) lists 21 states which currently treat municipalities and the state as separate sovereigns for double jeopardy purposes. Obviously the State of Florida may be added to this list; so, too, may the State of Tennessee. See *Mullins* v. *State*, 214 Tenn. 366, 380 S.W. 2d 201 (1964); *Greenwood* v. *State*, 65 Tenn. 557 (1873). While in a very real sense these state decisions are overruled by the *Waller* case, the states cannot be said in any sense to have relied upon a federal precedent in establishing their rule, as the federal precedent of *Grafton* v. *United States* was to the contrary, as pointed out in the *Waller* decision.

Although an examination of the impact of the *Waller* decision is precluded in accordance with the foregoing discussion of the authorities, it may be noted that the respondent has submitted certain data regarding this impact, consisting of responses received from law enforcement authorities in the various jurisdictions previously following the dual sovereignty rule. Disregarding any issue of admissibility of the data in its present form, it may be noted that the responding officials from ten

states previously following the dual sovereignty rule expressed the opinion that the *Waller* decision would have little or no effect on the administration of justice in their state (Alabama, Illinois, Idaho, Mississippi, Missouri, Nevada, Nebraska, Oregon, Wisconsin and Wyoming). Four expressed the opinion that sufficient data was not available to make an evaluation (Colorado, Minnesota, North Dakota and Oklahoma). And no response was received from seven states (Alaska, Iowa, Kansas, Louisiana, Ohio, South Dakota and Florida). Only the responses from two states (Tennessee and Washington) expressed the opinion that there would be a substantial effect on the administration of justice by a retroactive application of the *Waller* decision. Except upon the local level within this jurisdiction, the data submitted does not appear to satisfactorily establish a preference either for or against retroactivity.

A judgment will accordingly enter setting aside the petitioner's convictions and sentences in Criminal Docket Nos. 103,810, 103,811, and 103,812 in the Criminal Court for Hamilton County, Tennessee, and the petitioner will be forthwith released from custody by reason of the said convictions and sentences; PROVIDED, however, that release of the petitioner will be stayed for a period of ten (10) days following the entry of the judgment on this opinion to permit the respondent time within which to elect whether he shall take an appeal herein or seek any further stay from the appellate court. Should no appeal be filed within ten days, the petitioner will be forthwith released without further conditions upon his release. Should an appeal be filed within ten days, then, pursuant to Rule 23(c), *Federal Rules of Appellate Procedure*, the petitioner, as a condition to his release, will be required to file a bail bond in the sum of $1,000.00 with good and sufficient surety thereon, such bond to be returnable to this Court and conditioned in the usual form.

/s/ Frank W. Wilson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary

ORDER—January 7, 1971

This is a proceeding upon a petition for a writ of habeas corpus. The petitioner, Samuel Ed Robinson, avers that he is being illegally held in confinement by the State of Tennessee and seeks to set aside his convictions and sentences in three state court cases, each entitled "*State of Tennessee* v. *Samuel Ed. Robinson*," and being Dockets #103,810, #103,811, and #103,812 in the Criminal Court for Hamilton County, Tennessee. The petitioner was indicted in each of the aforesaid state court cases for assault with intent to commit murder and entered pleas of guilty thereto and was sentenced to two consecutive sentences of two to ten years and one consecutive sentence of three to five years. It is averred by the petitioner that prior to his state court indictments and convictions in the three cases here under attack the petitioner had previously been tried and convicted for three offenses of assault and battery in violation of an ordinance of the City of Chattanooga, Tennessee, the three municipal court convictions having arisen out of the occurrences giving rise to the three state court convictions. The petitioner's sole contention is that, in accordance with the recent decision in the case of *Waller* v. *Florida*, —— U.S. ——, 25 L.Ed.2d 435, 90 S.Ct. —— (April 6, 1970), he was twice placed in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments of the United States Constitution and that he is accordingly entitled to have his three aforesaid state

court convictions set aside and to be released from custody thereunder. An answer was filed on behalf of the respondent conceding the correctness of the petitioner's allegations regarding his convictions in both the municipal court and in the state court cases, but denying that the state court convictions were in violation of the Fifth and Fourteenth Amendments of the Federal Constitution as those amendments were interpreted at the time of the petitioner's three state court convictions (1962), and further denying that the recent (1970) decision to the contrary in the case of *Waller* v. *Florida*, *supra*, should be given retroactive effect so as to render the petitioner's convictions invalid. All facts in regard to the petitioner's convictions in both the municipal and the state court having been admitted and an evidentiary hearing having been conducted upon all matters relating to the issue of whether retroactive effect should be given to the decision in the case of *Waller* v. *Florida*, *supra*, the Court is of the opinion that the decision in the case of *Waller* v. *Florida* must be given retroactive effect, all for the reasons set forth in an opinion filed herein, and that the convictions and sentences of the petitioner in the state court here in issue must be set aside and the petitioner released from custody thereunder.

It is accordingly ORDERED that the convictions of Samuel Ed Robinson in the three cases of *State of Tennessee* v. *Samuel Ed Robinson*, Dockets #103,810, #103,811, and #103,812 in the Criminal Court for Hamilton County, Tennessee, are void and of no further force or effect. It is FURTHER ORDERED that the said Samuel Ed Robinson be forthwith released from any custody by reason of the aforesaid state court convictions; PROVIDED, however, that the release of Samuel Ed Robinson pursuant to this order be stayed for a period of ten (10) days following the entry hereof to permit the respondent time within which to elect whether he shall take an appeal herein or seek any further stay from the appellate court; and PROVIDED FURTHER that should an appeal be filed within ten (10) days of the entry of this order, then, pursuant to Rule 23(c), *Federal Rules of Appellate Procedure*, the petitioner, as a condition of

his release, will be required to file a bail bond in the sum of $1,000.00 with good and sufficient surety thereon, such bond to be returnable to this Court and to be conditioned in the usual form; and PROVIDED FURTHER that should no appeal be filed within ten (10) days of the entry of this order the petitioner will be forthwith released without further conditions upon his release, but subject to any further orders hereinafter entered in this cause.

APPROVED FOR ENTRY.

/s/ Frank W. Wilson
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON, PETITIONER

vs.

WILLIAM S. NEIL, Warden
Tennessee State Penitentiary, RESPONDENT

NOTICE OF APPEAL

Notice is hereby given that William S. Neil, Warden, respondent in the above named action, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order of the District Court setting aside the State convictions and sentences of petitioner and releasing him from custody of Tennessee authorities, entered in this action on the 7th day of January, 1971.

/s/ Edward E. Davis
EDWARD E. DAVIS
District Attorney General
Room 305 Courthouse
Chattanooga, Tennessee 37402
Of Counsel for Respondent.

NITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1138

AMUEL ED. ROBINSON, PETITIONER-APPELLEE,

vs.

WILLIAM S. NEIL, Warden, Tennessee
tate Penitentiary, RESPONDENT-APPELLANT.

BEFO E: PHILLIPS, Chief Judge, PECK, Circuit Judge and CECIL, Senior Circuit Judge.

APP
the Ea

JUDGMENT

THI
the U EAL from the United States District Court for
of Te tern District of Tennessee.

ON CAUSE came on to be heard on the record from
order ted States District Court for the Eastern District
of the essee and was argued by counsel.
is her

It CONSIDERATION WHEREFOR, It is now here
cover and adjudged by this Court that the judgment
itemi said District Court in this cause be and the same
said by reversed.

En further ordered that Respondent-Appellant re-
rom Petitioner-Appellee the costs on appeal, as
d below, and that execution therefor issue out of
istrict Court.

red by order of the Court.

/s/ James A. Higgins
JAMES A. HIGGINS
Clerk

A True Copy.

Attest:
/s/ James A. Higgins
JAMES A. HIGGINS
Clerk

Issu
COS
Fili
Prin

as Mandate: January 5, 1972

S: NONE

fee $——
ng $——
otal $——

No. 71-1138

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL ED ROBINSON, PETITIONER-APPELLEE,

v.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary, RESPONDENT-APPELLANT.

ON APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed December 10, 1971.

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and CECIL, Senior Circuit Judge.

PECK, Circuit Judge. The sole issue presented by this appeal is whether the recent United States Supreme Court decision, *Waller* v. *Florida*, 397 U.S. 387 (1970), declaring an end to the "dual sovereignty" theory with respect to criminal prosecutions by the States, should be accorded retroactive application. That decision, hereinafter discussed in detail, reversed a state court judgment of conviction based on an offense which had been the basis of an earlier municipal court conviction. The District Court for the Eastern District of Tennessee granted appellee Robinson's petition for a writ of habeas corpus and held that *Waller* should be applied retroactively. *Robinson* v. *Neil*, 320 F. Supp. 894 (E.D. Tenn. 1971)

The facts pertaining to the instant action are not complicated. In 1962, appellee was tried and convicted in the municipal court of three assault and battery offenses in violation of a Chattanooga, Tennessee ordinance, and was fined $50.00 and costs for each offense. Subsequently, he was named in three indictments charging assault with intent to commit first degree murder, arising out of the same facts resulting in the municipal convictions. Fol-

lowing arraignment in the state court of general jurisdiction, he pled guilty to each charge and received two consecutive sentences of two to ten years and one consecutive sentence of three to five years. He is presently confind in the Tennessee State Penitentiary, pursuant to the state court convictions.

In July, 1966, appellee filed a petition for writ of habeas corpus in the Criminal Court of Davidson County, Tennessee, contending that the state court convictions violated the double jeopardy guarantee in that they stemmed from the same facts and circumstances as his municipal court convictions. The petition was denied by the Criminal Court of Davidson County and the denial was affirmed by the Tennessee Supreme Court. In March, 1967, he filed a petition for habeas corpus relief in the District Court, advancing the double jeopardy argument. That court denied the petition on the ground that under *Palko* v. *Connecticut*, 302 U.S. 319 (1937), the Fifth Amendment double jeopardy provision was not applicable to the States through the Fourteenth Amendment. *Robinson* v. *Henderson*, 268 F. Supp. 349 (E.D. Tenn. 1967), *aff'd*, 391 F. 2d 933 (6th Cir. 1968). This court affirmed that determination by order dated April 10, 1968.

Soon thereafter, *Palko* v. *Connecticut*, *supra*, was overruled by the Supreme Court in *Benton* v. *Maryland*, 395 U.S. 784 (1969), which held that the Fifth Amendment double jeopardy provision is applicable to the States through the Fourteenth Amendment. With *Benton* as precedent, the Supreme Court granted certiorari in *Waller* v. *Florida*, *supra*, to test "the asserted power of [both a municipal court and a state court] within one State to place [a person] on trial for the same alleged crime." 397 U.S. at 390. As previously indicated, *Waller* held such multiple prosecutions to be violative of the Fifth Amendment, which leads us to the present case. In appellee's petition to the District Court, he stated that he had been tried and convicted by both the City of Chattanooga and the State of Tennessee for the same offense, and on authority of *Waller*, requested that his state conviction be overturned. *Waller*, however, left

open the question of whether the rule announced therein is to be given retroactive effect, leaving us free to decide that issue on its merits.

The *Benton* decision making the double jeopardy provision applicable to the States has been given full retroactivity. The Supreme Court stated in a footnote in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), decided the same day as *Waller*, that: "There can be no doubt of the 'retroactivity' of the Court's decision in *Benton* v. *Maryland*. In *North Carolina* v. *Pearce*, 395 U.S. 711, decided the same day as *Benton*, the Court unanimously accorded fully 'retroactive' effect to the *Benton* doctrine." 397 U.S. at 437, n. 1.[1] Furthermore, this court reached the identical conclusion in *Mulreed* v. *Koop*, 425 F. 2d 1095 (6th Cir. 1970). *See also*, *Booker* v. *Phillips*, 428 F. 2d 420 (4th Cir. 1970); and *Galloway* v. *Beto*, 421 F. 2d 284 (5th Cir. 1970).

In finding retroactivity of the *Waller* rule in the instant case, the District Court placed great weight on the rationale of *Benton* and the rationale which was persuasive in making *Benton* retroactive.[2] The District Judge quoted a passage from Mr. Justice Marshall's opinion in *Benton*, which is illustrative of the long and cherished heritage enjoyed by the double jeopardy guarantee in our system of justice. *Robinson* v. *Neil*, *supra*, 320 F. Supp. at 897. The Court then made two observations: (1) "[T]he retroactivity of the *Benton* decision has been decided and that case has been held to be 'fully retroactive.'," and (2) "*Waller* v. *Florida* overrules no previous federal judicial precedent." From this, the Court concluded: "When the foregoing two observations are jointly considered, they appear to be tantamount to a prior adjudication upon the issue [of retroactivity] and to require that *Waller* v. *Florida* be given fully retroactive effect." *Robinson* v. *Neil*, *supra*, 320 F. Supp. at 898. While we agree that the purpose of the *Waller*

---

[1] The Court also stated that *Benton* has full retroactivity in a footnote in *Price* v. *Georgia*, 398 U.S. 323, 330-31, n. 9 (1970).

[2] Even though the Supreme Court has never given its rationale for making *Benton* retroactive, the District Court relied upon the rationale of our decision in *Mulreed* v. *Kroop*, *supra*, 425 F.2d 1095.

rule is decisive of the issue of retroactivity in the present case, in our opinion the District Court herein was unduly swayed by the history and purpose of the double jeopardy guarantee applied to test *Waller*, rather than by the history and purpose of the *Waller* rule itself.

In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), the Supreme Court established that the test of retroactivity is concerned with the purpose of the specific rule under consideration, rather than with the particular constitutional right involved:

> "We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved.
>
> * * * *
>
> "We also stress that the retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based * * * [W]e must determine retroactivity 'in each case' *by looking to the particular traits of the specific 'rule in question.'*" 384 U.S. at 728. (Emphasis supplied.)

With this in mind we return to *Waller*. Petitioner, Joseph Waller, Jr., was arrested and charged in St. Petersburg, Florida, with violation of two city ordinances for taking a mural from the St. Petersburg City Hall and carrying it through the streets in a damaged condition. He was found guilty on both charges in the St. Petersburg Municipal Court and was sentenced to 180 days imprisonment. He was then tried and convicted on a charge of grand larceny for the same acts by the State of Florida and received a sentence of six months to five years, less 170 days of the 180 day municipal sentence.

Waller appealed to the District Court of Appeal of Florida and that court upheld each of the convictions on the ground that under Florida precedent, trial and conviction for the same offense in both a municipal court and a state court does not constitute double jeopardy. Following denial of certiorari by the Florida Supreme

Court, the United States Supreme Court granted certiorari and reversed his state court convictions.

In the Supreme Court, the State of Florida contended that municipalities and the State are separate sovereigns, permitting each to punish persons for the same crime. Florida argued that since the Supreme Court ruled in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), and *Abbate* v. *United States*, 359 U.S. 187 (1959), that successive prosecutions by a state court and a federal court for the same crime are constitutionally permissible as punishment by separate sovereigns, the same result should follow for the municipality and the State. The Supreme Court rejected Florida's argument, indicating that such reliance upon *Bartkus* and *Abbate* and their predecessor, *Fox* v. *Ohio*, 5 How. 410 (1847), was erroneous. The Court cited *Reynolds* v. *Sims*, 377 U.S. 533 (1964), for the proposition that municipalities have never been considered separate sovereignties from the State, but rather are political subdivisions thereof. The Court stated:

> "[The proper analogy] is to be found in the relationship between the government of a Territory and the Government of the United States. The legal consequence of that relationship was settled in *Grafton* v. *United States*, 206 U.S. 333 (1907) where [it was] held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign." 397 U.S. at 393.

Thereinafter, the *Waller* Court concluded:

> "Thus *Grafton*, not *Fox* v. *Ohio*, *supra*, or its progeny, *Bartkus* v. *Illinois*, *supra*, or *Abbate* v. *United States*, *supra*, controls, and we hold that on the basis of the facts upon which the Florida District Court of Appeal relied petitioner could not lawfully be tried both by the municipal government and by the State of Florida. In this context a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution.

"We decide only that the Florida courts were in error to the extent of holding that—

> 'even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.' 397 U.S. at 394-95.

From this, it is readily apparent that the purpose of the *Waller* rule is to put an end to successive prosecutions by municipal and state governments based on the same offense and to establish for purposes of criminal prosecutions or whatever, that municipalities are political subdivisions of the States possessing a relationship similar to the relationship between the federal government and its territories. Though all States have some form of the double jeopardy guarantee, either constitutional, statutory or common law (*Mulreed* v. *Kroop*, *supra*, 425 F. 2d at 1098), the *Waller Court* noted that nearly half of them permitted multiple prosecutions by municipalities and the State at the time of its decision. 397 U.S. at 391, n. 3. Thus, *Waller* simply compelled the States to abandon the long tolerated practice of successive prosecutions based on standards of double jeopardy.

Linkletter v. *Walker*, 381 U.S. 618 (1965), requires that in resolving a retroactivity issue we must consider the purpose of the new rule, the reliance placed on the old rule, and the effect on the administration of justice of a retroactive application of the new rule. And in *Desist* v. *United States*, 394 U.S. 244 (1969), the Supreme Court stated that "Foremost among [the *Linkletter*] factors is the purpose to be served by the new constitutional rule." 394 U.S. at 249. The Court in *Desist* further stated "* * * we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity." 394 U.S. at 251.

In both *Linkletter* and *Desist*, which involved the retroactivity of evidentiary exclusionary rules under the Fourth Amendment, the Supreme Court emphasized that the

purpose of the new rules was to act as a deterrent to illegal police action and that such purpose would not be furthered, nor would past misconduct be corrected by releasing all the prisoners whose convictions were not in accordance with the Fourth Amendment. 394 U.S. at 249. The prisoners involved, though victims of a constitutional violation, were admittedly guilty and the purpose of the rule would not be served by their release. 381 U.S. 637.

In the most recent Supreme Court decisions on retroactivity, *Williams* v. *United States*, and *Elkanich* v. *United States*, 401 U.S. 646 (1971), involving the retroactivity of *Chimel* v. *California*, 395 U.S. 752 (1969), under the Fourth Amendment and *Mackey* v. *United States*, 401 U.S. 667 (1971), involving the retroactivity of *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), under the Fifth Amendment, the Court reiterated *Linkletter* and *Desist*, stating that the relevant inquiry is whether the rule is aimed at the fundamental fairness of the result of trials or is designed "to serve other ends." *Williams* v. *United States*, *supra*, 401 U.S. at 653. The Court stated:

> "The petitioners in both *Linkletter* and *Desist* were convicted in proceedings that conformed to all then-applicable constitutional norms. In both cases the government involved had a concededly guilty defendant in custody and substantial unsatisfied interests in achieving with respect to such defendant whatever deterrent and rehabilitive goals underlay its criminal justice system.
>
> * * * *
>
> "[T]he authorities violated neither of petitioner's rights either before or at trial. No claim was made that the evidence against them was constitutionally insufficient to prove their guilt." 401 U.S. at 654, 656.

The Court found that the circumstances in *Williams*, *Elkanich* and *Mackey* were similar to those in *Linkletter* and *Desist* and accordingly denied retroactivity.

It is readily apparent that, in the present case, the integrity of the fact-finding process at trial is not under attack by the new rule. The occurrence of multiple prosecutions in the context of the instant case did not result in the imprisonment of concededly innocent people. Thus, we can see no good reason for the adoption of a rule which would free persons subjected to such prosecutions in the past. If this were done, the convictions for relatively minor offenses carrying relatively minor penalties would be left standing, while convictions for the far more serious offenses carrying far more severe penalties would be overturned on a wholesale basis. Indeed, an injustice would be worked on the citizens of those States if we were to deny to the States the opportunity to exact whatever rehabilitive measures have been deemed proper for the convicted persons involved.

We conclude that the purpose of *Waller* will be properly served by granting the new rule prospective effect only. The States were mandated by that decision to revamp their criminal laws and procedures to conform with the constitutional requirements pursuant to the double jeopardy guarantee. This is all that is needed to implement sufficiently the new rule insuring abolition of the "dual sovereignty" theory, and its resulting allowance of multiple prosecutions.

In light of the foregoing, we need not discuss the remaining two factors, reliance on the old rule and effect on the administration of justice of retroactive application of the new rule. However, these factors too favor nonretroactivity and since they are closely related to the first factor, some comment on them is appropriate.

On reliance, we note first that until *Waller* the Supreme Court had never decided whether multiple prosecutions by a municipal court and the state court constitute double jeopardy. If the States were relying solely on *Palko* v. *Connecticut*, *supra*, holding the double jeopardy guarantee inapplicable to the States, such reliance would appear to have been unjustified. *See Mulreed* v. *Kroop*, *supra*, 425 F. Supp. at 1098-99. But the States were also relying upon the "dual sovereignty" analogy between the municipal-state relationship and the state-federal re-

lationship expounded in *Waller*. *See e.g.*, *Thiesen* v. *McDavid*, 34 Fla. 440, 16 So. 321 (1894). This reliance proved unfounded, yet it cannot be said that it was clearly unjustified. As recently as 1967, a Louisiana District Court in *Louisiana ex rel. Ladd* v. *Middlebrooks*, 270 F. Supp. 295 (E.D. La. 1967), upheld multiple prosecutions by municipalities and the State based on the "dual sovereignty" analogy to the state-federal relationship.

Other theories have been advanced to justify multiple prosecutions. *See Note*, 68 MICH. L. REV. 336, 338 (1969). These theories argue, for example, that municipal offenses are too petty to be considered criminal prosecutions or that municipal interests and state interests are sufficiently different in their purposes as to require successive prosecutions. Though each of the theories may have been opposed by better reasoned arguments, the lack of federal law in this area prior to *Benton* and *Waller* left them open for some consideration and support.

As for the impact on the administration of justice by according *Waller* retroactivity, the District Court herein stated that at least two States (Tennessee and Washington), reported in a survey that they would be substantially effected and seven other States (Alaska, Iowa, Kansas, Louisiana, Ohio, South Dakota, and Florida), failed to report what effect it would have on them. *Robinson* v. *Neil*, *supra*, 320 F. Supp. at 899. With nine States possibly realizing a substantial effect and many others permitting multiple prosecutions, we think that, without more positive data, nonretroactivity is favored. In *Tehan* v. *United States ex rel. Scott*, 382 U.S. 406 (1966), the Supreme Court found nonretroactivity to be favored even though only six States were involved and data was not available to determine the actual number of cases effected within those six States. 382 U.S. at 417-18.

Reversed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

ORDER ON MANDATE

The respondent, William S. Neil, Warden, having appealed to the United States Court of Appeals for the Sixth Circuit, from an order entered in this cause on January 7, 1971 in which the convictions of petitioner SAMUEL ED ROBINSON in three cases, all styled *State of Tennessee* v. *Samuel Ed Robinson*, Docket numbers 103810, 103811 and 103812 in the Criminal Court for Hamilton County, Tennessee were declared by this court to be void and of no further force and effect; and that the said SAMUEL ED ROBINSON be forthwith released from any custody by reason of the aforesaid state court convictions; and further providing that should an appeal be taken from such order within ten (10) days then petitioner, as a condition of his release would be required to file a bail bond in the amount of $1,000.00 with good and sufficient surety thereon returnable to this Court and conditioned in the usual form; and the said Court having entered its order of judgement on December 10, 1971, which was issued as mandate on January 5, 1972 and filed by the Clerk on January 10, 1972, wherein it was ordered that the judgement of the District Court was reversed.

NOW, THEREFORE, upon the mandate of the United States Court of Appeals for the Sixth Circuit, IT IS ORDERED that the judgement of the District Court as set out in its order in this case dated January 7, 1971 be, and it hereby is, reversed.

IT IS FURTHER ORDERED that the convictions heretofore set out by docket numbers in the state court be, and they hereby are reinstated and declared to be in full force and effect.

IT IS FURTHER ORDERED that if petitioner has not heretofore been released by the respondent under the former order of this court that he will not hereafter be released by reason of such order. If petitioner has been released by virtue of said order under any of the conditions and provisions therein made for bail bond, that such bond shall be, and hereby is, cancelled and revoked and petitioner will immediately be returned to the custody of respondent.

APPROVED FOR ENTRY

/s/ Frank W. Wilson
FRANK W. WILSON
United States District Judge

CORRECT:

/s/ David Pack
DAVID PACK
For Respondent-Appellant
David Pack—Attorney General
State of Tennessee

/s/ Edward E. Davis
EDWARD E. DAVIS
For Respondent-Appellant
District Attorney, Of Counsel

/s/ James D. Robinson
JAMES D. ROBINSON
For Petitioner-Appellee

SUPREME COURT OF THE UNITED STATES

No. 71-6272

SAMUEL ED ROBINSON, PETITIONER

v.

WILLIAM S. NEIL, Warden

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 15, 1972

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 489691 880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6272

SAMUEL ED ROBINSON,
Petitioner,

v.

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

JERRY H. SUMMERS
206 Professional Building
Chattanooga, Tennessee 37402

JAMES D. ROBINSON
Goins, Gammon, Baker & Robinson
700 Hamilton National Bank Bldg.
Chattanooga, Tennessee 37402

Co-Counsel for Petitioner

Washington, D. C. THIEL PRESS 202 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6272

SAMUEL ED ROBINSON,
Petitioner,

v.

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals below (App. p. 80) is reported in 452 F.2d 370 (1971). The opinion of the District Court below (App. p. 65) is reported in 320 F. Supp. 894 (E.D. Tenn. 1971).